No. 83-254

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ZELMA FELLNER, *et al.*,
Cross-Petitioners,

v.

BARBARA JEAN BERRY, *et al.*,
Respondents.

REPLY BRIEF OF CROSS-PETITIONERS FELLNER, ET AL., TO CONSOLIDATED OPPOSITION OF BARBARA JEAN BERRY, RESPONDENTS, TO PETITIONS FOR CERTIORARI OF FELLNER AND COLOMA BOARD OF EDUCATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

THE ISSUE ON WHICH CROSS-PETITIONER FELLNER ASKS THIS COURT TO ACT IS NOT MOOT.

Respondents' brief at page 32 misstates the status of the Intervenor-Petitioners, Fellner, et al, when Respondents state "the State Board has already, with permission of the district court and before the district court concluded the remedial hearings, rescinded its earlier approval of the Sodus II transfer.... Thus, to an extent, the issue on which the intervenors wish this Court to act has been mooted by the state board's decision to rescind the approval and adopt new procedures which preclude consideration being given in the future."

Intervenor-Petitioners Fellner, et al., show that at a pre-trial conference held by the District Court on February 3, 1975, counsel for the state defendants

suggested that in order to permit the state to be released as a defendant, the state might be willing to cause the state board of education to rehear and rescind the Sodus II transfer.

At a pre-trial conference held on July 7, 1975, counsel for the state defendants suggested that the state would be willing to stipulate to a permanent order against the Sodus II transfer as part of a settlement stipulation, the quid pro quo of which would be the dismissal of Eau Claire as a party defendant and the terminating of any further relief sought by plaintiffs against the state.

The state board of education held a rehearing on the Sodus II territory transfer petition on January 7, 1976. Thereafter, it vacated its earlier order of July 3, 1974, which had ordered the

school territory transfer on the basis of educational needs. Subsequently, an action under the Michigan Administrative Procedures Act was filed in the state circuit court by Fellner, et al. That case was thereupon removed to the United States District Court on a petition for removal of the state. The case was assigned to Judge Noel P. Fox who was the same judge then assigned to this instant case.

A motion to remand was filed by Fellner, et al. Judge Fox, on February 12, 1976, remanded the case to the state court. In his opinion Judge Fox ruled that the state court's conduct in the state action did not pose any threat to any matter which must be decided in the Berry case. Subsequently, Judge Fox held that the state "court's intervention into a case concerning solely issues of state

law is not appropriate, and the motion to remand is hereby granted."

On September 5, 1978, the state circuit court entered an order declaring null and void the rehearing proceedings of the state board leaving in tack the board's original order of July 3, 1974. This ruling of the Berrien County Circuit Court was based upon state law. The order provided that "the state defendant shall take no action on any proposal, be it of its own or any other party, until the Sodus transfer area is no longer in litigation and then only subject to the review and superintending control of this court." The state court further retained jurisdiction of the action pending disposition of this federal action.

Respondent Berry therefore misstates the present status of Intervenor-

Petitioners. Clearly, the issue on which the intervenors wish this Court to act has not been mooted by the state board's decision because the state board's recision action has been declared null and void.

The voided action of the state board of education, taken for the purpose of attempting to extricate itself and the Eau Claire School District from this federal lawsuit, cannot justify the wiping away of the rights and interests of parents of children living in the Sodus II transfer area who were properly concerned with the educational problems facing their children. Neither does the failure of the State of Michigan nor the Eau Claire School District to pursue further review of the case in this Court moot Intervenor-Petitioners' claim. What is significant is that at no time did the state board of

education reverse its findings of fact that the Sodus II transfer should be granted on the basis of stated educational concerns.

This Court's review concerning the constitutional limits of the federal judiciary as it impacts on the administration of public education at the state and local levels is necessary to prevent exactly what did occur in this case, that being the bargaining away of the proper educational judgments of parents and school districts in an attempt to buy peace from intrusive federal court action. This Court should grant Cross-Petitioners' Petition for Writ of Certiorari precisely for the reason that local and state administative authorities should no longer be relegated to initiative-stifling roles as minions of

the courts. School boards, state and local, should be permitted to carry out their educational functions in accordance with existing state law so long as the actions of such school administrative authorities has not been racially motivated. "Federal courts no longer should encourage this deference by the appropriate authorities -- no matter how willing they may be to defer." Columbus Board of Education v. Penick, 443 U.S. 483 (1979) (Rehnquist, dissenting).

Respectfully submitted,

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